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PAROLE RELEASE DECISION-MAKING: REHABILITATION, EXPERTISE, AND THE DEMISE OF MYTHOLOGY

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Parole is increasingly the subject of scrutiny and criticism by students and observers of corrections, as well as by attorneys concerned with the rights of prison inmates.¹ This attention is welcome, for it helps to unveil

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¹ An increasing number of law review articles have appeared in recent years concerning parole. See, e.g., compilation in 11 AM. CRIM. L. REV. 217, 224-25 (1972).

The press has also begun to address increasing attention to parole. See, e.g., Bagdikian, The Closed Courts of No Resort, Washington Post, April 16, 1972, § B, at 1, col. 1; Buyer, I Think That I'm a Better Risk Than I Was Before, National Observer, April 1, 1972, at 22, col. 1; Editorial, Invisible Federal Parole, N.Y. Times, Aug. 30, 1971, at 28, col. 2; Gumpert, Masters of Fate—the U.S. Board of Parole Blunts Some Criticism—But By No Means All, Wall Street Journal, Jan. 14, 1972, at 1, col. 1;
a hitherto obscure, yet crucial, component of the corrections process.\(^2\)

There appear to be at least two dynamics operative in this increasing attention accorded parole. The first of these is in some measure an outgrowth of the evolving protections erected in the criminal process to guard individuals at the pre-incarceration stages against governmental abuses. Such decisions as *Miranda*,\(^3\) *Escobedo*,\(^4\) *Argersinger*,\(^5\) and *In Re Gault*\(^6\) have increasingly sensitized lawyers, and laymen as well, to the issues of due process and other constitutional protections for those charged with violations of the law. The absence of such protections in the corrections system as a whole, of which parole is of course one component, has come to appear increasingly incongruous.\(^7\)


In New York, the formation of a seventy-member Citizens' Inquiry on Parole and Criminal Justice was announced on October 10, 1972. In announcing its formation, its Chairman—former Attorney General Ramsey Clark—stated that parole was "perhaps the most neglected, and certainly one of the most critical, parts of the system—or non-system, if you prefer—of penology, prisons, rehabilitation." He added: "I think it is important that the citizens of this state know how parole functions in fact—not just the law and the concept—but how it really works." Markham, *Private Group Plans Year's Study of State Parole*, N.Y. Times, Oct. 10, 1972, at 25, col. 4.

The National Prison Project of the American Civil Liberties Union, based in Washington, D.C., has adopted parole litigation as one of its primary foci of concern.

2. This is not to say, of course, that parole has been immune in the past from criticism. See, e.g., M. MOONEY, THE PAROLE SCANDAL (1939). See also NATIONAL COMM. ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 132-35 (1931) [hereinafter cited as WICKERSHAM COMM'N REPORT]; Kilbride, *Probation and Parole in Their Relation to Crime*, 7 J. CRIM. L.C. & P.S. 173, 174-76 (1916) (responding to the contention that parole is a form of leniency).

7. Until recent years, the "hands-off" doctrine supported judicial abstention from
Second, as attorneys and other individuals have moved increasingly into the prison arena, some of the more subtle problems of the corrections system have surfaced. It has been fairly easy to oppose brutality—assuming, of course, access to the assaulted prisoner could be obtained to ascertain its existence. Other aspects of prison life—such as the classification process and the parole process—were less apparent, but have loomed larger with the increasing awareness of the nature of incarceration.

For the most part, the major critical emphases have focused on parole revocation and parolee misconduct. This is not surprising. To the lawyer, the process of parole revocation can be comfortably analogized to the conviction process, and thus is particularly amenable to traditional legal argumentation. To the public, the post-release component is that aspect of the parole process which is of greatest concern, prison releases being viewed as particularly likely perpetrators of crime.

intervention in prison operations. With some exceptions, this doctrine prevailed until the 1960's. Recently, courts have begun to discard this posture, and have dealt with prisoners' grievances. See generally Kutak & Klippert, Prisons on the Endangered List, 11 AM. CRIM. L. REV. 165, 166-69 (1972); Goldfarb & Singer, Redressing Prisoners' Grievances, 39 GEO. WASH. L. REV. 175 (1970).


10. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court announced that under the due process clause a parolee facing revocation is entitled to both a preliminary hearing and a final hearing, both imbued with at least some of the traditional due process elements. The Court did not include as one of these elements the right to counsel at such proceedings. See note 84 infra.

11. Considerable attention has been directed at enhancing parole supervision by reducing the caseloads of parole supervisors, the aim being reduced recidivism. See TASK FORCE REPORT, supra note 1, at 70; Hearings, supra note 1, at 436 (testimony of Merrill Smith, Chief, Division of Probation, Administrative Office of U.S. Courts). The data, however, seems to indicate little advantage in reduced caseloads. See, e.g., Robison & Smith, The Effectiveness of Correctional Programs, 17 CRIME & DELIN-
Certainly we do not dispute or criticize these foci of attention. They are both necessary and proper. But our concern here is with the parole release decision—an event obviously precedent to concerns about the actual conduct of parolees and the revocation of parole. This decision has the most profound implications for the men and women who are incarcerated. As a consequence, parole release decision-making has a very significant impact upon the business of running prisons. Likewise, it has considerable import for the public. Moreover, the parole release decision process raises vital issues about the functions of incarcera-
tion—most specifically, about the bundle of ideas and notions which go into what is called rehabilitation.

Our particular concern stems from the legislative efforts essayed in the 92d Congress to enact parole "reform" legislation. Nineteen days of hearings were devoted to this endeavor. Four bills were considered by Subcommittee No. 3 of the House Committee on the Judiciary, and a complex, lengthy bill emerged as the product of these hearings. Hopefully, the 93d Congress will see this legislation carried through to fruition. In considering this legislation, we found the issues of procedural protection and standards at the release decision-making stage to be considerably more difficult to resolve than matters concerning revocation—a reflection, we believe, of the underlying complexity of the release decision.


One of the more exotic proposals for parolee supervision is a system of "small personally worn transmitters that permit the continuing monitoring of the geographical location of parolees." This has been termed "an electronic rehabilitation system." The implications of such monitoring include remote control measurement of voice, blood pressure, physiological activity, and electroencephalogram, with appropriate control measures transmitted back to the wearer. R. Schwitzgebel, Development and Legal Regulation of Coercive Behavior Modification Techniques With Offenders 17-19 (Public Health Service Pub. No. 2067, 1971).


14. H.R. 16276, 92d Cong., 2d Sess. (1972), was introduced by Congressmen Kastenmeier, Conyers, Ryan, Mikva, Drinan, Railsback, Biester, Fish, and Coughlin.

15. This legislation has been introduced as H.R. 1598, 93d Cong., 1st Sess. (1973), by Congressmen Kastenmeier, Conyers, Drinan, Railsback, Biester, Fish, and Coughlin, as H.R. 978 by Congressman Rodino, and as H.R. 2028 by Congressmen Mitchell, Abzug, and Mazzoli.
The major focus of this legislation is the infusion of due process into the parole release and revocation systems. Obviously, we believe this is an essential minimal step toward bringing the rule of law into a system which has been described as one in which "parole officials carry on for the most part the motif of Kafka's nightmares." But notwithstanding the imperatives we perceive in importing due process into the parole setting, we are concerned lest the introduction of due process mark a conclusion to the critical study of parole which is currently emerging. If the only result of this mounting attention focused upon parole is the infusion of due process, parole may well continue to flourish with its underlying premises continuing to go largely unexamined. Should this occur, we are convinced that a serious opportunity for bringing the light of reality into the unreal world of corrections will have been lost. We do not welcome such eventuality: there is simply too much negative evidence at hand to forego substantive assessment of a system whose practices and very premises place it on precarious footing.

I. THE PAROLE ENVIRONMENT

A. Parole As A Component Of The Corrections Process

Parole is today an integral component of the corrections process, with every state, the District of Columbia, Puerto Rico, and the federal government having a paroling authority. In 1970, 54% of the adults released from prison in a total of forty-six reporting jurisdictions left as parolees. Their number exceeded 54,000. In the various jurisdic-


19. National Probation & Parole Institutes, Prison Releases, Paroles, and
tions, parole as a mode of release ranges from a little over 2% to 97%. Moreover, the frequency with which parole is utilized as a means of release is rising. In addition, in some jurisdictions mandatory releasees are deemed to be released on parole for purposes of assuring control over them.

Despite the wide usage of parole, the statistical data concerning this entity are meager. Moreover, the statistics available are often confusing; for example, the United States Board of Parole claims to have made approximately 12,000 release decisions concerning adults in the federal fiscal year running from July 1, 1969 through June 30, 1970. Yet, the actual number of releasees has been expressed in percentages ranging from 45.5 to 34.4 to 23.7.

A recent national survey of parole systems has found considerable diversity in the manner of its operation. While in most jurisdictions the board conducts at least an interview, if not a hearing, with the prospective parolee, the procedures employed are less uniform. Some states utilize hearing examiners, some single board members, some panels of board members, some the full board. The average number of cases heard in a day ranges from a low category of one to nineteen to a high of forty and over.

At these hearings or interviews, thirty jurisdictions bar the use of counsel; thirty-four bar the inmate from presenting witnesses; forty do not record the reasons for the decision; thirty-one keep no verbatim record of the proceedings; and twenty-nine do not inform the inmate directly of the decision.

B. Criticisms of Parole

Were prisoners the only people finding fault with the parole system,
there would be little impetus for reform or examination of the system, save the impetus generated by prison riots and strikes. Whatever the other theoretical purposes of incarceration—general and special deterrence, rehabilitation, incapacitation, stigmatization—there is a generalized public desire for at least some vengeance to be visited upon criminal offenders. If parole were consciously chosen as a means to achieve that end, we would venture to say that this would serve the public's goal.

However, there is a large body of opinion—outside the inmate community—that finds parole seriously deficient. The first level of criticism focuses upon procedural failings. Parole has been characterized by the "bible" of the corrections field as "largely uncontrolled by legal standards, protections, or remedies." 29 The 1967 President's Commission on Law Enforcement and the Administration of Justice stresses the need for correctional authorities to take "steps to insure that there are adequate safeguards by providing for hearing procedures, review of decisions by people removed from the immediate situation, explicit policy guidelines and standards, and adequate records to support decisions." 30 The working papers of the National Advisory Commission on Criminal Justice Standards and Goals speak of the "substantial shortcomings" in existing parole hearing procedures. 31

In terms of procedural shortcomings, the federal parole system has probably received closer study—and consequently more stringent criticism—than most. One of its harshest critics has concluded that "the performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the federal government." 32 In reviewing its operations he observed:

29. AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 279 (1971). See also Hearings, supra note 1, at 501 (testimony of William Parker, Senior Research Assistant, Parole—Corrections Project, American Correctional Ass'n); id. at 235-36 (testimony of Prof. Fred Cohen); articles cited in note 169 infra.


31. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, WORKING PAPERS C-196 (1973) [hereinafter cited as WORKING PAPERS].

32. K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY 133 (1968) [hereinafter cited as DISCRETIONARY JUSTICE]. Former U.S. Senator Charles Goodell, Chairman of the Committee on the Study of Incarceration, characterized the United States Parole Board as "a total failure." Hearings, supra note 1, at 597. See also W. GAYLIN, IN THE SERVICE OF THEIR COUNTRY 332-342 (1970); Gaylin, supra note 1. In testifying before Subcommittee No. 3, Dr. Gaylin stated:

"[T]he Parole Board is not just an anachronism. It is in a sense, I think, a positive danger. We live in a time when the equity of our judicial procedure is very
An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents; the degree of openness of proceedings and records is about the least possible; and procedural safeguards are almost totally absent. Moreover, checking of discretion is minimal; board members do not check each other by deliberating together about decisions; administrative check of board decisions is almost nonexistent; and judicial review is customarily unavailable.\textsuperscript{33}

The problems with the United States Board of Parole have also recently been highlighted within the federal government itself by the Administrative Conference of the United States. Subsequent to an extensive study of the Board, the Conference this past year adopted a formal recommendation calling for considerable infusion of due process into United States Parole Board procedures.\textsuperscript{34} The clear implication is that the practices of the Board are deficient; the suggestions made are directed toward remedying these deficiencies.

The second level of criticism is directed at the counter-productive consequences of parole. Testimony to this facet of parole decision-making lies in the frequency with which grievances concerning parole are associated with prison disturbances. Thus, the former director of the United States Bureau of Prisons has noted, in response to a query concerning the impact of parole on the job of the prison administrator, that parole has a "tremendous impact, [an] overwhelming impact. . . . They feel they don’t now get anything but a very perfunctory hearing, and when they are denied, they resort to the only measure of protest

\textsuperscript{33} Seriously being questioned and respect for law is at a dangerously low point. Any institution which is so flagrantly unjust, operating as part of the Department called Justice, contributes to that resentment and alienation which nurtures antisocial and criminal activity. Hearings, supra note 1, at 445-46.

\textsuperscript{34} Discretionary Justice, supra note 32, at 126. Recently, the United States Board of Parole has developed some guidelines for decision-making. These guidelines are intended to structure discretion, enabling it to be exercised in a fair and rational manner. Address by M. Sigler, Chairman, United States Board of Parole, Nat’l Conference on Criminal Justice, Jan. 24, 1973. See also note 55 infra.

open to them; namely, some sort of a strike."\(^{35}\) Obviously, even if the
dramatism of a riot is absent, the frustration and embitterment engen-
dered in inmates can have little positive value, and most likely will have
negative consequences.

A variation on this theme is the perception of parole as virtually
prostituting whatever beneficial programs penal institutions may have
to offer. Thus, one critic has assessed parole as "dysfunctional as well
as arbitrary and capricious."\(^{36}\)

Instead of promoting rehabilitation, it promotes connivance, favor seek-
ing, and manipulation. By providing the inmate with a possible avenue
out of the prison—in the form of maximum security "big houses"—his
energies are not directed to coming to grips with himself and his environ-
ment, and preparing for renewed life on the outside.

He is concerned first and foremost with manipulating the system, and
those who appreciate this natural drive use the parole system to facilitate
the detention and security function of prisons. . . .\(^{37}\)

This contorted influence of parole is one greatly feared by parole
board members. They are constantly concerned about being conned by

\(^{35}\) Hearings, supra note 1, at 359 (testimony of James Bennett). See also Rubin,
Needed—New Legislation in Correction, 17 CRIME & DELINQUENCY 392, 393 (1971);
note 53 infra and accompanying text.

National Council on Crime and Delinquency, Parole Decisions (1972) (a
policy statement approved by the Council's Board of Directors on Oct. 31, 1972),
depicted the aftermath of the typical ten minute hearing in the following manner:

. . . The prisoner then returns to prison routine and awaits the decision in a state
of anguish.

To be denied parole is frustrating. But to be denied parole without any explana-
tion for the decision is embertering and rancorous.

Because no rationale is given, the prisoner, comparing his case to that of others
who were granted parole, may see the denial as a capricious decision. He is often
at a loss to understand what he has done wrong or how he can improve his
performance. Parole board silence compounds his cynicism and his hostility to
authority.

At the very least, unexplained parole denials obstruct rehabilitation. . . .

\(^{36}\) Hearings, supra note 1, at 343 (testimony of Sanford Rosen, former member,
Institutional Bd. of Review, Patuxent Institute, Maryland). Another witness testified:
The removal of the inequities and the inefficiencies of parole would enable us to
get on with the business of building an effective and humane system of correction,
a system which would offer just and equal treatment, work and learning
opportunities, and the chance to discharge one's sentence with dignity and individual-

\(^{37}\) Id. at 650-51 (testimony of Robert Brooks, Chief of Program Development, Conn.
Dept' of Corrections).

\(^{37}\) Id. at 343 (testimony of Sanford Rosen).
the inmate,\textsuperscript{38} who may, for example, purposefully cause disruption for a period of time, and then follow this with a period of model behavior so as to demonstrate his reformation, or who may initiate other deceptive activities to demonstrate that he has been rehabilitated.\textsuperscript{39}

A third level of criticism directed against the parole process is more profound, questioning the very existence of parole, notwithstanding even the infusion of due process reforms. Thus, the same critic who noted the dysfunctional nature of parole suggested that “the distortions in our penal system that result are so egregious that the Congress might well consider eliminating parole.”\textsuperscript{40} A recent conference of trial lawyers looked toward the same end, recommending: “Until such time as the present parole system is eliminated by short definite prison terms, due process should apply to both the initial granting and revocation of parole or good conduct time.”\textsuperscript{41} Similarly bleak views were registered before Subcommittee No. 3 by an active prisoners’ rights litigator:

[T]he parole boards and the operators of our parole systems leave so much to be desired that there are serious questions as to whether parole is a good thing to have at all. By that I mean not so much whether people should be released early—I have no doubts about that because our sentences are terribly long, much too long—but rather whether the kind of discretion that is involved in the parole grant process can be lodged in any group.\textsuperscript{42}

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\textsuperscript{38} See, e.g., R. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 266 (1969) [hereinafter cited as Sentencing]. Cf. Hearings, supra note 1, at 183-84 (testimony of Petey Greene).

\textsuperscript{39} See, e.g., Hearings, supra note 1, at 184-86 (testimony of Petey Greene). Seventy percent of inmates polled in California answered “yes” to the question: “Do you believe that therapy and treatment programs are games?” They gave responses such as: Most cons know how to walk that walk, talk that talk, and give the counselor what he wants to hear.

\textsuperscript{40} California Youth & Adult Corrections Agency, The Organization of State Correctional Services in the Control and Treatment of Crime and Delinquency 198 (1967) [hereinafter cited as Cal. Youth & Adult Corrections]. Cf. B. Bagdikian & L. Dash, The Shame of the Prisons 102-05 (1972) [hereinafter cited as The Shame of the Prisons], wherein one inmate initially denied parole despite relating therapeutic accomplishments to the first examiner, successfully obtained parole in her second attempt by “acting stupid.”

\textsuperscript{41} Hearings, supra note 1, at 343 (testimony of Sanford Rosen).

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Continuing, he stated:

[R]ehabilitation in the sense of personality changes or things like that—I don't think we know what we are talking about. And the Parole Board does not know and God knows their performance does not show that they can be trusted with this kind of thing.43

Still another witness maintained "that no matter how much money you spend on the Parole Board and parole system, it still is going to be a failure, because it attempts to do something which cannot be done."44

C. The Prisoners' Views

An essential component of any analysis of parole and its functions within corrections must take into account the views of the clientele of the system—prison inmates. As one author has noted:

People generally do not appreciate . . . [t]hat a prisoner does have a perspective of the penal and parole systems that no one else can get, and, therefore, his expressions are necessary in order to have a complete description of the entire penal and parole systems, . . .45

Parole is the dominant concern and dominant source of frustration in virtually every prison. Prison riots capture headlines, but parole is in control of the mind and heart of virtually every prisoner.46 For the authors this soon became apparent after beginning a series of visits to various federal and state penal institutions, accompanied by hearings on several occasions.47

43. Id. at 301.
44. Id. at 598 (testimony of Hon. Charles Goodell, Chairman, Committee for the Study of Incarceration).
45. Rasmussen, Prisoner Opinions About Parole, in CRIMINOLOGY 649, 651 (C. Vedder, S. Koenig & R. Clark eds. 1953) [hereinafter cited as PRISONER OPINIONS]. See also L. JAMES, PRISONERS’ PERCEPTIONS OF PAROLE (1971), wherein criticism by inmates in the Canadian system centers around the issues of board expertise, low parole rates, selection and communication.
46. See, e.g., Ginzburg, Castrated: My Eight Months in Prison, N.Y. Times, Dec. 3, 1972, § 6 (Magazine) at 144. See also OHIO CITIZENS’ TASK FORCE ON CORRECTIONS, FINAL REPORT C26-27; Hearings, supra note 1, at 474 (testimony of James R. Hofha); id. at 387 (testimony of George Reed, Chairman, United States Bd. of Parole).
47. A psychiatrist who testified before Subcommittee No. 3 maintained that "the whole parole procedure probably contributes more to the unhappiness—the feeling of paranoia and abuse of the prisoners—than any other individual thing in the prison setting," Id. at 450 (testimony of Dr. Willard Gaylin, President, Institute of Society, Ethics & the Life Sciences).
48. See, e.g., Hearings on Corrections—Prisons, Prison Reform and Prisoners' Rights: California—Before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d
At one level, the prisoner’s preoccupation with parole is easily understandable. Parole is the avenue to the street. Virtually every man and woman wants out, and for most, parole is the quickest means to get there. But more than this, parole epitomizes for most inmates a system of whim, caprice, inequity, and nerve-wracking uncertainty. They find the issue of their liberty governed by a system where no reasons for parole denial are provided; the prisoner’s file, to which the inmate is barred access, governs decision-making; adverse witnesses are undisclosed and favorable ones prohibited; hearings are limited to a perfunctory three or four or five minutes; disparate treatment is accorded with no discernible justification; and the courts turn a deaf ear to inmate complaints.

We think it essential that this perception of parole be understood. Any responsible assessment of parole must recognize the enormous hatred which is directed toward it by prisoners, if for no other reason than that the pragmatics of prison management require prison administrators to deal with the frustrated clientele they control. There is of


While the board acts favorably in most cases, it engenders hostility because of the inconsistency of its rationale. Some inmates who have had good behavior records in prison are “hit” (denied parole), while others with many infractions are granted parole. Some inmates with a long record of prior offenses may receive parole, while others, including first offenders, may be denied it. Nobody gives the inmate an explanation of these obviously inconsistent decisions or describes in anything more than meaningless generalities the criteria used by the board in arriving at its decisions. Institutional parole officers give inmates pointers on what might subsequently impress the board, such as enrolling in Bible classes. But inmates who follow this advice carefully often find they are hit nevertheless. As a result, inmates are left to speculate among themselves as to the reasons for the board’s decisions. Corruption and chance are among the favorite inmate speculations.

Id. at 97.
course a very significant additional reason for recognizing this situation. Lawlessness in the corrections process is not likely to imbue respect for the law in the corrections system's clientele. That hardly augers well for the public, to which 95% or more of all prison inmates eventually return.

Some of the most vivid presentations of prisoners' perceptions of parole have been forthcoming in the mail received from inmates. Many of these letters express a depth of despair which assures that whatever the validity of the factual premises on which the writers are basing their letters, their emotions are intense. One federal inmate has written:

This board serves no usefull [sic] function, [sic] on the contrary, it is a terrible detriment to any meaningfull [sic] rehabilitation of convicted persons. This board causes frustration, anger, and terrible bitterness not only in men incarcerated but in their families as well. I don't think I have to remind you that it is society as a whole who must pay the price for years of bitter frustration and anger. Probably the board of parole, more than any other single "thing" [sic] is the prime cause of the very high rate of recidivism in our prisons.50

Another inmate, equally aggrieved, wrote:

Its [sic] too late for me. But I strongly feel you will help others. I can't explain the hate and bitterness this caused in me.51

And another, older, inmate wrote:

[O]ver the past five years of my confinement I have had the opportunity to observe the great traumatism created in the incarcerated man by our present system (?) utilized by our parole board. And of course the major problem here seems to be in the methods (?) of the Parole Board itself. Or more correctly, the lack of human compassion and true knowledge of human nature itself [sic].52

Obviously, individual correspondence is in no way a systematic means to ascertain inmate views concerning parole: many men and women who

49. L. James, supra note 45, in which the author writes:
Without an accurate framework by which to assess the inmate's knowledge, we must consider his perceptions not as correct or incorrect but in the context that these are his impressions, gathered from several sources and that, in part, they form the basis for his attitudes and behavior toward parole.

Id. at 192.


write are particularly aggrieved; the more satisfied individuals are likely to remain silent. Nevertheless, the degree of complaint is so considerable that it cannot be ignored. More importantly, to rationalize grievances concerning parole as the product of self-interest does not mitigate the reality of these grievances, nor does it lessen the consequences frustration, anger, and disappointment may breed.

That these grievances can assume very serious proportions is evidenced by the common inclusion of parole procedures and operation on lists of demands and complaints issued by prisoners in the course of prison work strikes and riots.\textsuperscript{53} In sum, there is little to dispute the

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53. See, e.g., \textit{Attica Report}, \textit{supra} note 48, at 92. Included among Attica prisoner demands agreed to by Commissioner Russell Oswald were: (1) provision or allowance of legal assistance at all proceedings, with such to be in compliance with due process of law; (2) assurance that State Commissioner would recommend termination of administrative resentencing of inmates returned for parole violations; (3) recommending that revocation hearings be held promptly and fairly; and (4) refraining from charging paroled inmates with parole violations for moving traffic violations, or driving without a license, unconnected with any other crime. For a complete list of the twenty-eight demands forwarded by Attica inmates, see \textit{Hearings}, \textit{supra} note 1, pt. 3, at 3-4 (testimony of Rep. Badillo). See also text accompanying note 35 \textit{supra}.

The longest work strike in Federal Bureau of Prisons history occurred in February, 1972, at the United States Penitentiary at Lewisburg, Pennsylvania. There was considerable dispute as to whether there was any formal list of grievances formally submitted to the institution's administration. A list later submitted to the authors by several inmates contained numerous grievances and recommendations concerning parole:

1. Establish a separate parole board at each federal institution with hearings to be conducted on a monthly basis. The participation of institutional personnel in actual parole hearings and reviews shall be emphasized, particularly those staff members who experience daily contact with individual prisoners.
2. An offender must be reviewed by the Board within 90 days following his commitment to a federal institution, regardless of the nature of the crime.
3. A positive, planned program must be established by the Board for each prisoner at his initial review hearing. Upon satisfactory completion of the program, the offender shall be granted an immediate parole release.
4. The contents of institutional records shall be made available to a prisoner at the time of his parole hearing or review and he shall have the right to legal representation and to produce witnesses in his behalf at all times.
5. All prisoners shall be notified of the decision of the Board at the immediate conclusion of his hearing, and shall have the right to question the decision of the Board at that time, in which case the Board must provide the exact reason(s) for their decision.
6. All prisoners shall be subject to parole release after having completed one-third (1/3) of their maximum sentence.
7. All first-offenders confined to this penitentiary shall be reviewed by the Board within 90 days, regardless of any previously established hearing or review dates in individual cases.
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observation of the New York State Special Commission on Attica that parole as perceived by prisoners is "an operating evil." 64

II. PAROLE’S RESPONSE

Not surprisingly, increasingly trenchant criticism of parole has not yet generated overwhelming movement towards reform—generally cast in the form of due process protections—by paroling authorities. Some indications of internal housecleaning are visible, 65 and we can probably reasonably expect this trend to continue to some extent. But generally the posture of paroling authorities, like other components of the corrections process, has been one of quite vigorous resistance to change. 66 And thus far this posture has been very successful. 67

8. Any portion of a sentence served by a prisoner while on parole shall be automatically credited towards the full term of his original sentence. This shall include such release terms as Mandatory Release.

The Governor of New Jersey, in supporting his proposed parole reform legislation, cited such reform as one of the demands of the rioting prisoners at Rahway Prison. Parole Reform Stirring Fears, N.Y. Times, Dec. 19, 1972, at 47, col. 5.

54. ATTICA REPORT, supra note 48, at 93. See also G. KASSEBAUM, D. WARD & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT 180 n.9 (1971) [hereinafter cited as TREATMENT & SURVIVAL].

55. The United States Board of Parole, subjected to particularly trenchant criticism over the last year or so, has recently instituted a pilot program involving several federal institutions. Prisoners will be able to be represented by nonattorneys and will receive reasons should parole be denied. 12 CRIM. L. Rptr. 2084 (1972).

Some jurisdictions, including Wisconsin and Minnesota, are experimenting with contract parole, whereby the offender, the institution staff, and the paroling authority enter into an agreement as to the program which the offender will pursue. The agreement specifies the programs the institution will provide, the inmate’s agreement to successfully complete the programs and other specific objectives, and a specific parole date which is guaranteed or assured upon completion of such programs. See NATIONAL WORKSHOP OF CORRECTIONS AND PAROLE ADMINISTRATORS, CORRECTIONS—PAROLE—MDT—PROJECT (American Correctional Ass’n, Resource Document No. 2, 1972).

Many changes in parole board procedure are of course being compelled by outside pressures, such as legislative hearings, official studies, and judicial decisions. For instance, numerous jurisdictions will have to considerably elevate the level of due process involved in parole revocation in order to comply with Morrissey v. Brewer, 408 U.S. 471 (1972). See note 84 infra.

56. For a description of this posture, see Decision-Making Characteristics, supra note 26, at 652-54.

In the past parole's defenses against the imposition of procedural safeguards have focused, in legal terms, upon claims that parole is an act of grace, or that the parolee contractually consents to whatever is done to him, or that the parolee is really just a prisoner outside the walls. The sterility of this "holy trinity" of theories has been incisively analyzed, and it is likely that whatever persuasiveness it once possessed is fast fading.\(^{58}\) The ripples of the Supreme Court's recent decision in \textit{Morrissey v. Brewer}, rejecting the right-privilege argument in the context of parole revocation,\(^{50}\) may well speed its demise.

Nevertheless, there is still one potent defense in parole authorities' arsenal which seems to be retaining its vitality. This is the idea that parole boards are a unique animal, possessing special expertise which is employed to assess the rehabilitation of the inmate to the end of determining when he is ready for release into the free world.\(^{60}\) This view is seen in particularly robust form in one of the most recent judicial assessments of the release decision-making process, \textit{Menenchino v.} 

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\(59\). 408 U.S. 471 (1972). \textit{See note 84 infra. But see Comment on Morrissey v. Brewer, supra note 17, at 621-22, regarding a gloomy forecast of Morrissey's emanations so far as the parole release process is concerned.}

In Scarpa v. United States Bd. of Parole, 468 F.2d 31 (5th Cir. 1972), decided shortly before \textit{Morrissey}, the court implied that the analogies between parole revocation and parole granting are sufficiently strong to suggest importation into the latter process of at least some of the procedural protections afforded in revocation proceedings.

\(60\). In characterizing the special role of parole boards, one witness before Subcommittee No. 3 made that distinction which has thus far very effectively rebuffed assault:

Parole boards, by statute, are not regulatory boards, as many other regulatory commissions and boards are, regulating mere products, public services, labor, or interstate commerce, but a board attempting to evaluate personality modification, if any, toward rehabilitation of the individual. \textit{Hearings, supra} note 1, at 385 (testimony of George Reed). To the extent that there is a distinction as to governmental entities regulating "products," "public services," "labor," or "interstate commerce," it would seem that the press for greater protections for the subject of regulation would fall on the side of individuals regulated, rather than "products." Thus, it would seem that the procedural protections which are characteristic of typical agency actions should be even further emphasized in the case of parole board determinations.
Oswald,\(^{61}\) in which a state prisoner raised the issue of due process rights at the parole release stage. The district court dismissed the complaint; the circuit court affirmed, with one judge dissenting. The circuit court first observed, citing then-Judge Burger’s opinion in Hyser v. Reed\(^{62}\) with approval, that:

> [T]he Board has an identity of interest with . . . [the prisoner] to the extent that it is seeking to encourage and foster his rehabilitation and readjustment to society.\(^{63}\)

Continuing, the court expanded on the notion of expertise intertwined with rehabilitation:

> The Board’s function is a different one [than engaging in an adversary proceeding]. It makes the broad determination of whether rehabilitation of the prisoner and the interests of society generally would best be served by permitting him to serve his sentence beyond the confines of the prison walls. . . . It must consider many factors of a non-legal nature, such as psychiatric reports with respect to the prisoner, his mental and moral attitudes, his vocational education and training, the manner in which he has used his recreation time, his physical and emotional health, his intra-personal relations with prison staff and other inmates, his habits, and the nature and extent of community resources that will be available to him upon his release, including the environment to which he plans to return. . . .

> [T]he problem to be resolved is not one which usually demands the traditional skills, training and expertise of legal counsel. Far more important is an understanding of the numerous other factors which we have mentioned, which have to do with medicine, psychiatry, criminology, penology, psychology, and human relations. . . .\(^{64}\)

Clearly, the argument for parole’s integral role as the diagnostician

\(^{61}\) 430 F.2d 402 (2d Cir. 1970).

\(^{62}\) 318 F.2d 225 (D.C. Cir. 1963).

\(^{63}\) 430 F.2d at 407.

\(^{64}\) Id. at 407-08. But see Kadish, Police and Sentencing Discretion, 75 Harv. L. Rev. 904, 926-28 (1962).

It may be that a very significant factor for the Menenchino court, albeit a largely sub silentio one, was the anticipated flooding of the courts “with demands for appointed counsel in the thousands of parole release interviews held annually,” but certainly the court employed sufficient language to obscure that concern. 430 F.2d at 406 n.1.

The Menenchino court’s view of parole in New York bears little relationship to the depiction of it detailed in Attica Report, supra note 48, at 93-102. Perhaps the dissonance of this report with the judicial characterization of parole and assessment of its actual operation can be read as demonstrating the surface persuasiveness of the parole authorities’ arguments for expertise, linked to rehabilitation.
of the degree to which an offender has been rehabilitated is a powerful one. And consequently it is a common one.

A. Parole and Rehabilitation

This concept of rehabilitation, allied with expert diagnosis of its presence, has sustained the advance of indeterminate sentencing and the accompanying diminution of the role of the judiciary in determining the length of incarceration to be served by a convicted offender. In large measure, the devolution of this role from the judiciary to parole authorities turns on the belief that it is essential to consider the offender after

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65. The evolution of parole into a treatment mechanism has recently been described in O'Leary, Issues and Trends in Parole Administration in the United States, 11 Am. Crim. L. Rev. 97, 126-28 (1972).

66. See, e.g., Hearings, supra note 1, at 385 (testimony of George Reed); id. at 533 (testimony of Llewellyn Linde, Chairman, Minn. Adult Corrections Comm'n).

67. The true indeterminate sentence is one in which no maximum is set, and in which release may occur at any time—or never—depending upon the decision of the releasing agency. The indefinite sentence is one having a legislatively prescribed maximum, with release being possible at the discretion of the releasing agency at any time prior thereto, unless there is also a prescribed minimum, in which case release could not occur until at least that minimum had been served. In three states—California, Hawaii, and Washington—the board fixes the date of parole consideration by the imposition of a minimum sentence. "In each of these jurisdictions, the board clearly acts as a sentencing tribunal as well as a parole board." Decision-Making Characteristics, supra note 26, at 657. Federal sentencing law does not include pure indeterminate provisions, but does provide for indefinite sentences. See, e.g., 18 U.S.C. §§ 4202, 4208 (1970).

While pure indeterminate sentencing has not carried the day, legislative endorsement of indefinite sentencing is very common. By 1922, thirty-seven states had already adopted some form of the indefinite sentence. P. TAPPAN, CRIME, JUSTICE AND CORRECTION 434-35 (1960). A summary of the arguments for and against indeterminate sentences is excellently provided in Prettyman, The Indeterminate Sentence and the Right to Treatment, 11 Am. Crim. L. Rev. 7, 15-21 (1972).

One study has pointed out eleven possible variations in sentencing systems involving the manner of fixing and imposing minimum and maximum terms. See D. GLASER, F. COHEN & V. O'LEARY, THE SENTENCING AND PAROLE PROCESS (1968). See generally W. PARKER, supra note 18, for timing of eligibility for parole.

68. One commentator speaks of the "erosion of the judicial role in sentencing which has taken place over the last century." Foote, The Sentencing Function, in Warren Conference Report, supra note 41, at 18.

It has been pointed out that parole decision-making really constitutes deferred sentencing. See generally SENTENCING, supra note 38. See also Frankel, supra note 16, at 30; Tappan, Sentencing Under the Model Penal Code, 23 LAW. & CONTEMP. PROB. 528, 533 (1958); Hearings, supra note 1, at 191-207 (testimony of Prof. Robert O. Dawson). As the Task Force Report, supra note 1, at 86, states: "Parole legislation involves essentially a delegation of sentencing power to the parole board."
incarceration has begun. During the course of imprisonment, changes are going to be wrought which will signal an appropriate time for reintegration to the free world and the board's expertise is the implement employed to gauge the arrival of that particular moment.

In order to assess the wisdom of these developments as they relate to the present parole release process, it is essential to assess the validity of the premise of rehabilitation on which parole turns. If that premise fails, then whatever claims of expertise are made by parole boards and whatever the validity of these claims, the nature of that expertise comes back to earth, midst the routine, albeit vital, workings of other governmental agencies fed with information and called upon to make judgments on the basis of perceptible policies and relevant data.  

1. Prisons As Rehabilitative Institutions

Improvement through imprisonment is an essential element in the posture of parole decision-making authorities, as is demonstrated in one of the basic documents of the parole profession, the proceedings of the National Conference on Parole, held in 1956:

Ultimately, readiness for parole must be determined on the basis of genu-

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69. According to the Wickersham Commission, the trial judge is no more able to set the date on which the prisoner will be able to return to society than a doctor can name the hour that the patient will recover. Only time will tell when the inmate will be rehabilitated. WICKERSHAM COMM'N REPORT, supra note 2, at 142-43.

70. Parole boards' status as administrative agencies, channeled, directed and responsive to pressures and concerns like other governmental entities, has been thus described:

In the absence of normative standards which are generally accepted or enforced by legal rule or precedent or appellate review, to reach a viable compromise of conflicting interests becomes the chief function of sentence-fixing. For the sentence-fixer, the characteristics of the criminal must compete with the necessities of placating right-wing political pressure, displaying the necessary level of cooperation with law enforcement and prosecution, heeding the management interests of correctional bureaucracy, keeping a finger on the pulse of seething unrest in inmate populations, trying to maintain some degree of consistency with colleagues of widely divergent views, parrying the moves of those who would usurp his jurisdiction or manipulate him for their own ends, or compromising what he thinks are right solutions because of the constraints dictated by budget priorities or administrative policies over which he has no control. Along this route the normal defendant-inmate—that unexceptional figure who represents 80 or 90 per cent of the caseload—is a lonely and almost forgotten actor. Possessing neither substantive legal rights nor political muscle, he is the pawn in an interest conflict that he can influence only by chance and which he seldom understands. Foote, supra note 68, at 18.
ine change in the personality and growth in the desired direction, and experience has shown that for some offenders continued treatment in the institution enhances their capacity to become law-abiding citizens. This criterion of parole selection is as difficult to determine as it is fundamental in its significance.

Depending upon the form of maladjustment and the circumstances leading to the offense for which he was committed, certain changes in the attitude of the inmate toward himself, toward law, toward the institution administration, toward parole, etc., should be expected. Growth in insight into his own problems and into the real motives for the offense should be expected, as should evidence of a capacity for self-direction and acceptance of responsibility for his behavior. There should be an accompanying sincerity and depth of interest in self-improvement. These are all relatively intangible factors, difficult to measure objectively. . . .

While the kind of growth described is no doubt desirable, unfortunately there is little evidence that imprisonment is in fact effective in producing positive change in those who are incarcerated. The working

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One means viewed to measure this "personality modification" apparently involves an acknowledgment of guilt. The former Chairman of the United States Board of Parole, testifying before Subcommittee No. 3, spoke of the recognition by the inmate of the "fact that he had committed an offense; that he, in fact, has violated the rules of society." This act of recognition constitutes a "cathartic experience" which "is the first step in any real meaningful procedure, whether it is on a psychiatrist's couch, in a mental institution, or in a prison." Not until there is "an acceptance of responsibility" can "you start to make any real progress with insight that later develops into maturation and inner controls that make them safe to determine their own lives on the outside." Hearings, supra note 1, at 402 (testimony of George Reed). See also Bator, Finality In Criminal Law And Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 452 (1963). Cf. S. Halleck, Psychiatry and the Dilemma of Crime 306-07 (1967).

Cf. Klonsky, We Must Be Doing Something Right, Am. J. of Correction, Jan., 1969, at 6, 11, in which the author, a parole supervision officer, writes:

In the structured environment of an institution, the conflicts which bombarded the offender in free society and are causal to his pathology, are diminished, if not eliminated entirely. He enjoys the dependency fostered in the institution. With the lessening of the deep-seated hostility and anxiety, the offender is amenable to suggestion and encouragement. He becomes a willing participant in the utilization of the institutional facilities and services. It is, therefore, during his confinement, a most unexpected place, that inmate ability and talent emerge from the unconscious, unfettered and vibrant. Those of us who are in the field of rehabilitation are afforded an opportunity to view the drama of "hidden gifts discovered." It is in the institution that many offenders exhibit an interest in studies, display artistic talent or creative qualities. A beginning has been made! The initial spark of enthusiasm has been generated . . . .
papers of the National Advisory Commission on Criminal Justice Standards and Goals state: "time spent in confinement is inversely related to success on parole, . . ."72 A study sponsored by the California Legislature's Assembly Criminal Procedure Committee reported: "[t]here is no evidence that prisons rehabilitate most offenders."73 Witnesses before Subcommittee No. 3 of the House Committee on the Judiciary have registered like views:

—Our prisons do not turn out better citizens. They release men who are more likely to behave like crazed animals or passive robots.74

—Psychiatrists and clinical psychologists do not have much of a record of successes. Fancy prisons and equipment do not reform. Educational and vocational training taught in a prison setting can have little effect on men's attitudes.75

The empirical data buttressing these statements are virtually unanimous in their dismal findings. For example, one authority has noted, after critically evaluating all studies published between 1945 and 1967: "[o]n the whole, the evidence from the survey indicated that the present array of correctional treatments has no appreciable effect—positive or negative—on the rates of recidivism of convicted offenders."76

Numerous other references can be cited.77 Kassebaum, Ward, and Wilner, in an extensive study of group counseling—to which the California correctional system has made a major commitment—and parole outcome, concluded that "post-release outcome was not significantly


75. Id. at 75 (testimony of Prof. Marshall Clinard).


77. See, e.g., Treatment & Survival, supra note 54, at 308. See also L. Wilkens, Evaluation of Penal Measures 74-84 (1969); Robison & Smith, supra note 11; Miller & Kenney, Adolescent Delinquency and the Myth of Hospital Treatment, 12 Crime & Delinquency 38 (1966).
different irrespective of exposure to any type of group counseling program or stability of leadership. 78 A lengthy study of vocational rehabilitation programs in federal institutions concluded:

If all sorts of treatment had an impact on improving performance for a wide range of types of persons, then the present research design and analysis should have been adequate to reveal this. However, a general impact of this nature was not apparent. Experimental-control differentials overall are substantively slight but statistically significant and show that experimentals do somewhat worse. 79

Another survey of one hundred reports done between 1940 and 1960 on correctional programs and outcome finds that "evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability." 80

Thus, there is little evidence to dispute the term "myth," which has been applied to the notion of prisons as rehabilitative institutions. 81 Certainly, some men and women have changed for the better in prison, but even as to them the evidence would suggest that at best imprisonment was a neutral factor; in some cases, they succeeded despite their experience. The consequences are profound for parole. The rhetoric of

78. Treatment & Survival, supra note 54, at 251.
81. John Bartlow Martin's statement, written almost twenty years ago, is now respectable opinion:

[T]he professional people have taken refuge in resounding shibboleths and impressive titles. They have devised the dangerous myth—myth because it is not true that prison can rehabilitate men, dangerous because their pretense leads them to loose dangerous men upon society. . . .

Rehabilitation in prison today is a pie-in-the-sky idea. We have arrived at the point in penological history where we appear to believe that if we provide the stainless-steel kitchen, the schools and shops and toilets, one day rehabilitation will descend upon the inmate, like manna. And it is not only wardens and penologists who believe this; it is the inmates as well. Nothing could be more pathetic than the sight of a mangled kid from the slums hopefully, and almost prayerfully, toiling in the garment factory, clinging to the dream that one day he will awake to find himself rehabilitated.

The truth is that a rehabilitation "program" in today's prison is utter nonsense. Prison is a place to keep people locked up. It can never be more.

rehabilitation has until recently largely carried the day. But that day is
drawing to a close, and this very rhetorical commitment to the beneficial
role of incarceration may well carry within it the seeds of the ultimate
demise of parole boards. For if prisons are not regarded as institutions
of reformation, what indicia of reform are parole boards to look for?
With the debunking of rehabilitation as "one of the great myths of
twentieth-century penology," those whose raison d'etre has been that
myth are in a very precarious state, particularly insofar as they resist
infusion of procedural safeguards by intoning the watchword of rehabili-
tation.

2. Rejection Of The Mythology Of Rehabilitation

To some extent, the courts are beginning to penetrate through the
cloak of beneficence tendered by the rehabilitation concept. In In Re
Gault, the Supreme Court looked at the realities of the juvenile justice
system, found little in practice to praise, and responded with the erection
of due process protections. Similarly, in the field of parole, myths are
deflating: in Morrissey v. Brewer, the Court mandated a very explicit
panoply of constitutionally required due process safeguards in revoca-
tion proceedings, reasoning:

We see, therefore, that the liberty of a parolee, although indeterminate,
includes many of the core values of unqualified liberty and its termina-
"grievous loss" on the parolee and often on others. It is hardly
useful any longer to try to deal with this problem in terms of whether the

83. 387 U.S. 1 (1967).
84. 408 U.S. 471 (1972). The Court ruled that due process requires (1) a reasonably
prompt informal inquiry conducted by an impartial hearing officer near the place of the
alleged violation or arrest to determine if there is reasonable ground to believe that the
arrested parolee has violated a parole condition. This inquiry must observe the following
conditions: (a) the parolee should receive prior notice of the inquiry, its purpose, and
the alleged violation; (b) the parolee may present relevant information and, absent
security considerations, question adverse informants; (c) the hearing officer is to digest
the evidence on probable cause and state the reasons for holding the parolee for the
parole board's decision. Second, there must be a formal revocation hearing conducted
reasonably soon after the parolee's arrest. This hearing must include: (a) written notice
of the claimed violation of parole; (b) disclosure to the parolee of evidence against him;
(c) an opportunity to be heard in person and present witnesses and documentation; (d)
the right to confront and cross-examine adverse witnesses, unless the hearing officer
specifically finds good cause for not allowing confrontation; (e) a "neutral and det-
tached" hearing body such as a traditional parole board, members of which need not
be judicial officers or lawyers; and (f) a written statement by the factfinders as to the
evidence relied on and reasons for revoking parole.
parolee’s liberty is a “right” or a “privilege.” By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.85

Morrissey rejects theory and looks to actuality.86 Not only does the Court reject the right-privilege distinction, it also implicitly abolishes the notion forwarded by parole authorities that the parolee on the street is still caught up in the process of rehabilitation, where due process need not intrude.87

Outside the courtroom, certainly one of the most penetrating assessments of the intimate alliance of the myth of rehabilitation and the power parole boards draw from it has been rendered by Judge Marvin Frankel:88

The naive faith in the presumed expertise of penologists and parole officials effectively blots out some of the stark and familiar realities of prisons as they actually function. The notion that the unrehabilitated prisoner should be denied parole because he needs more treatment is not merely unsupported; it runs counter to considerable evidence and opinion concerning the effects of confinement. Taking prisons as they are, and as they are likely to be for some time, it is powerfully arguable that their net achievement is to make their inhabitants worse, not better. [Footnote omitted.] It may be bracing doctrine to insist that the prisons must be improved to make rehabilitation a reality. [Footnote omitted.] Passing now the question whether we know how to do this, the ideal is worthy beyond question. And I hope nothing said here suggests any cavil about that. My central point, however, entails a firm view about the proper order of things; we have no right to keep people confined ostensibly to rehabilitate them when we lack the means of rehabilitation. Until or unless we have some reasonable hope of effective treatment, it is a cruel fraud to have parole boards solemnly order men back to their cages because cures that do not exist are found not to have been achieved.89

85. Id. at 482.
86. As to rejection of the mythology of parole release decision-making—an issue not before the Court—the Court seemed to imply its continuing vigor, describing parolee’s purpose as being “to help individuals reintegrate into society as constructive individuals as soon as they are able . . . .” Id. at 477.
87. See, e.g., Hearings, supra note 1, at 385 (testimony of George Reed):
[B]asic to every decision of the Parole Board is a philosophy of releasing inmates on parole at the psychologically “right time” to best assure their eventual complete rehabilitation [emphasis added].
88. See also Struggle For Justice, supra note 72, at 91-93; Hearings, supra note 1, at 90 (testimony of Prof. Leonard Orland, former member, Conn. Bd. of Parole); id. at 236 (testimony of Prof. Fred Cohen).
89. Frankel, supra note 16, at 34. For the view that an understanding of the very
Judge Frankel's perception of the abuse of the rehabilitation theme in parole decision-making is, we believe, a dawning one. The dissatisfaction with prisons is on the verge of carrying over into analogous analysis of parole. What remain pending are judicial and legislative recognition of the facts that, as one commentator points out, "[t]he policy which this myth protects—the policy of the indeterminate sentence—has been successfully embodied in law, in the power of paroling authorities, in treatment specialties, in public opinion," and, as he concludes, "the myth of correctional treatment is now the main obstacle to progress."

Needless to say, parole authorities are not going to willingly embrace the coffin of rehabilitation as it descends to desuetude. The investment is too great. Nor for that matter are other components of the corrections process, notwithstanding their own institutional conflicts with parole boards, going to welcome the demise of parole's power. These compo-
ments, too, have a stake in the retention of this power—"[b]oth the flexibility and the benign visage of treatment," with which parole is intimately intertwined, "continue to be of value to social control agencies."  

This value lies in the freedom from traditional restrictions imposed upon governmental agencies which are, in turn, exercising impositions upon the individual. Such freedom has profound implications for the way in which we view individual rights because, at base, the final logic of the treatment position is that all fetters should be abrogated when the good of the individual or the good of society are the ends ostensibly sought. The result, of course, is a degree of control over the individual which would be quickly rejected, were the ideology of treatment not thrust to the fore as a cosmetic shield.

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means of these devices, parole becomes supplanted and perhaps even irrelevant. Cf. Task Force Report, supra note 1, at 65.

To what extent parole board hostility accounts for the comparatively minor use of graduated release programs by prisons is unclear. Certainly, there are other significant factors operating, such as lack of employment opportunities in the rural areas in which many institutions are located, potential worker displacement, and statutory impediments. See Ayer, Work-Release Programs in the United States: Some Difficulties Encountered, 34 FED. PROBATION, March, 1970, at 53; Riskin, Removing Impediments to Employment of Work-Release Prisoners, 8 CRIM. L. BULL. 761 (1972). Whether, in fact, actual hostility is even operative is unclear, although it has been noted. See, e.g., Hearings, supra note 1, at 209 (testimony of Prof. Vincent O'Leary). Nevertheless, the institutional dissonance between two establishments competing for one authority—release power—is a virtually necessary consequence of the growth of alternatives to incarceration.

Ultimately, the individual inmate may be the one to become frustrated. See, e.g., Penal Study Comm. of the N.C. Bar Ass'n, Interim Report 7 (1971), which states:

We have had cited to us several examples of men . . . having completed the [study release or training] course, [and] being sent back to serve additional time on their sentences.

93. Treatment & Survival supra note 54, at 324. See also Struggle For Justice, supra note 72, at 83-99.

94. Dean Allen has trenchantly assessed the dangers of the rehabilitative ideal. F. Allen, The Borderland of Criminal Justice (1964). He has pointed out that "under the dominance of the rehabilitative ideal, the language of therapy is frequently employed, wittingly or unwittingly, to disguise the true state of affairs that prevails in our custodial institutions and at other points in the correctional process." Id. at 33. Further, "the rehabilitative ideal has often led to increased severity of penal measures." Id. at 34. In addition, "the rise of the rehabilitative ideal has often been accompanied by attitudes and measures that conflict, sometimes seriously, with the values of individual liberty and volition." Id. at 35. See also Morris, Impediments to Penal Reform, 33 U. Chi. L. REV. 627, 637-645 (1966); N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 111-144 (1969); N. Kittrie, The Right To
Granted, it may give "us a nice warm feeling to talk about treating people rather than punishing offenses," but nice warm feelings are hardly a tenable basis for large-scale reduction of liberties fundamental to our society and of safeguards—specifically, traditional due process protections—aimed at encircling those liberties with meaningful protections against governmental incursions.

B. Parole and Expertise

If rehabilitation is the metier of parole, then expertise is the purported tool of the parole board for assessing it. "The essence of the treatment position is that it requires expert judgment to make treatment decisions." But, even putting aside the validity of treatment, or rehabilita-

BE DIFFERENT (1971); T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963).

Morris and Howard propose the following formula: "Power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes." Secondly, "correctional practices must cease to rest on surmise and good intentions; they must be based on facts." N. MORRIS & G. HOWARD, STUDIES IN CRIMINAL LAW 119 (1964).

Kittrie proposes another formulation. First, he looks to "the fourth and fifth amendments, peripherally joined by the first and third amendments." N. KITTRIE, supra, at 390. These, he posits, have been conceptually merged in Griswold v. Connecticut, 381 U.S. 479 (1965), to form the right of privacy, creating "a zone or field of individual life and activity into which the state may not enter," which "should...be sufficient to prohibit the state from invading the personality and altering it..." Id. He also looks to the eighth amendment, which offers the base for "development of the right which would equally restrict the power of the therapeutic state:"

Certain treatments that would alter the physical or psychological structure of an individual to the point of permanently depriving him of certain physical powers or basic personality traits might be prohibited as per se unreasonable treatments. Treatments that would leave the individual intact, but would require lengthy terms of treatment, close surveillance, submission to indignities, etc., could be prohibited as excessive or inappropriate when measured against the danger posed by the untreated individual.

Id. at 390-91.

Finally, Kittrie finds a possible repository of "the right to personality" in the ninth amendment. Using it, "one might outlaw certain surgical, chemical, or psychological techniques altogether, or at least insist that the measure of treatment be proportionate to the severity and social hazard of the deviation." Id. at 393. One might also attempt "to delineate personality characteristics that would be immune from alteration." Id. Or one might take a different tack—"perhaps the propriety of therapy should depend on whether the treatment is constituted for the patient as an end in himself rather than as a means to broader social aims." Id. at 393-94.

96. Martinson, supra note 90, at 18.
tion, as a gauge by which to justify parole decision-making, parole board exercises require consideration of a number of elements.

Unfortunately, assessment of the *modus operandi* of these endeavors is not encouraging: the authors of the Model Penal Code observe that "parole decisions rest on the intuition of the paroling authority."97 A similar view is that "many judges must sentence largely on chance and hunch, and many parole boards release largely on the same method."98

One student of parole has noted that "parole board members review a file on an inmate, interview him, and then apply some theory of human behavior or perhaps merely intuitive judgments in evaluating the information which they have gathered."99 And he continues:

While such techniques are useful in parole decision-making, the evidence is quite strong that over a large number of cases they result in a fair amount of error with respect to predicting the likelihood that a specific offender will succeed or fail on parole.100

Clearly, prediction of risk is the primary concern of parole boards as they seek to apply their expertise to the factors before them. No doubt some acumen develops with experience,101 but experience alone has rarely been deemed totally satisfactory. Consequently, a primary thrust of attention in the parole field has been the devising of statistical devices to improve decision-making by enhancing the ability to forecast proba-

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100. *Id.* See also *Hearings, supra* note 1, at 536-37 (testimony of Llewellyn Linde). Cf. Hakeem, *Prediction of Parole Outcome From Summaries of Case Histories*, 52 J. Crim. L.C. & P.S. 145 (1961), reporting on research that investigated whether parole officers can make predictions of parole outcome and other predictions through the use of summaries of case histories. Ten parole officers and ten laymen made a series of predictions related to parole outcome on the basis of the case summaries of 200 parolees, half of whom actually had been returned to prison for parole violations. The range of correct predictions regarding parole outcome was greater for the ten laymen than for the parole officers. *Id.* at 149.

ble recidivism. Nevertheless, the problem of inadequate expertise has not been resolved.

Although parole prediction techniques have generally demonstrated a greater accuracy than the traditional case approach, they have not been greatly utilized. Boards have been reluctant to rely on prediction devices for a variety of reasons: the view that parole decision-making is by its very nature an individualized process; the imprecision of the devices; the view that some of the factors involved in decision-making—such as concern for public opinion—are simply not statistically quantifiable. Moreover, even should increasingly refined prediction devices be developed, scientific clarity is still going to be adulterated by elements of imprecision and individualization at the juncture where the computer’s role ends and the individual decision maker’s role begins.

So while statistical prediction devices do offer some relief for the concern that the vaunted expertise of parole boards is really merely informed exercise of broad discretion, they do not resolve the issue. Discretion still operates, and will continue to operate, as to what elements go into the devices, how these devices are applied to the individual inmate, and what weight is given factors extrinsic to the statistical data.


104. See, e.g., Evjen, Current Thinking on Parole Prediction Tables, 8 CRIME & DELINQUENCY 215 (1962); Hayner, Why Do Parole Boards Lag in the Use of Prediction Scores?, 1 PACIFIC SOCIOLOGICAL REV. 73, cited in SELECTED READINGS, supra note 98, at 626.

105. Much stress is laid upon interviewing of prisoners as a necessary step in the decision-making process. The hearing is one traditional due process element which is present in most state systems. Yet Giardini observes that “hearing interviews are notorious for inadequacy from the standpoint of time given to them and for lack of skill on the part of the interviewers.” G. GIARDINI, THE PAROLE PROCESS 131, 164 (1959)[hereinafter cited as PAROLE PROCESS]. One of the most devastating indictments of the purported expertise of parole board members in conducting interviews—and the manner in which these interviews are conducted—is made by Gaylin, supra note 1. Noting the stringent procedures, including a critical reevaluation of each interview in two separate group sessions, followed by psychiatrists, who are trained interviewers, in
A second defect in the expertise equation lies in the inability to measure parole board members' performance. Recidivism is a shaky barometer of decision-making skill. So many factors may account for the commission of a criminal offense by a parolee that one can hardly lay the blame for miscalculating at the door of board members. Then, too, there is a strong likelihood that many offenses go undiscovered, and there is also the possibility that revocation of parole, a base for recidivism statistics, will in fact turn on non-criminal acts performed by the parolee. Finally, the barometer of recidivism is even further skewed by the factor of the population that is denied parole. Any bureaucratic organization has a propensity to avoid mistakes and this is particularly true of entities such as parole boards, whose mistakes may well generate considerable public disaffection. Consequently, the board's predisposition in case of doubt will be to retain the inmate in prison.  

Determining admission to the Columbia Psychoanalytic School, he notes that the "parole board has no such group evaluation." *Id.* at 92.

Brevity of interviews with inmates is one of the more frequently criticized aspects of the process. The chairman of the California Adult Authority has stated that in "a rather routine type case, that is, routine from our standpoint, we would probably leave [the inmate] in the room approximately 10 or more minutes. It can vary from that. . . ." *Hearings on Corrections—Prisons, Prison Reform and Prisoners' Rights: California—Before Subcomm. No. 3 of the House Committee of the Judiciary, 92d Cong., 1st sess., ser. 15, pt. 2, at 25 (1971)* (testimony of Henry W. Kerr, Chairman, Cal. Adult Authority). Yet he also points out the signal importance of such hearings *[Id.* at 130 (prepared statement of Henry W. Kerr)], thereby calling into question the adequacy of the time allotted the routine case.

106. See *Cal. Youth & Adult Corrections*, *supra* note 39, cited in *R. Minton, supra* note 48, wherein the following analysis was set forth:

The four state parole boards have a most complicated as well as agonizing decision to make on every offender:

1. While there is an enormous amount of information in the offender's case file, these are difficult to read and interpret, and do not present clear-cut conclusions.
2. The staff who know the inmate best are required to present descriptive and evaluative reports on the subject, but in the case of adult prison inmates are not allowed to recommend a disposition.
3. It is extremely difficult to assess change in an individual in a ten to thirty-minute interview.
4. There is doubtful correlation between behavior in an institution and behavior in the community. In fact, conformity in the institution setting may be related to excessive dependency and may portend parole failure.
5. There is no immediate risk if the parole board decided not to release, whereas there is always some degree of risk in every release.
6. Parole boards are most always criticized for the failures which occur among those released.
decision, whether correct or mistaken, is incalculable in terms of the recidivism equation since there is no way of knowing whether the inmate would have committed new crimes, had he been released.

Not only is expertise immeasurable, but it also appears to be untrainable. In terms of special training in fields having relevance to parole decision-making, little supports the notion that there are particular qualifications which will enhance the process. One witness before Subcommittee No. 3, in addressing this issue, pointed to the absence of "evidence bearing on the relationship of the background of parole board members [in terms of professional training] to the adequacy of decisions."\(^7\) This is not a surprising conclusion. Since parole decision-making is governed by a variety of factors—ranging from the mechanical verification that a detainer is outstanding on an inmate, to searching for attitudinal change, to moral assessments of the propriety of releasing the perpetrator of a serious crime—it is difficult to establish what training would be appropriate, assuming that training did play some substantive role in the quality of the decision-making process.

There are two further problems with the notion of parole board expertise. First, there is real question—apart from issues of imprecision, training, and measurement—with the very concept of expertise as applied to some of the exercises in which parole boards engage. And second, there is good reason to question why this expertise is not deployed prior to incarceration, rather than at some time later, in the course of it.

For example, parole boards claim that they look to the offender's past history. This examination has two premises. One is that the board is a moral arbiter, considering a man's past and the offense which he has committed as elements in the decision as to the duration of his present confinement. The second is that the past is indicative of the future.

As to the first premise, we find basic difficulty in the notion that moral disapproval is an appropriate role for parole boards, and certainly we find little supporting the position that expertise can be operative here.\(^8\) In response, the contention may be made that such

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7. There are, therefore, abundant numbers of forces which influence decisions for more incarceration time; on the other hand, there is virtually no advocacy agent for less time—other than the offender himself.  
Id. at 315. See also Bixby, A New Role for Parole Boards, 34 FED. PROBATION, June 1970, at 25, 26.  
107. Hearings, supra note 1, at 222 (testimony of Don M. Gottfredson, Program Director, National Council on Crime and Delinquency Research Center).  
108. Judge Frankel writes:  
The "seriousness of the crime" is a matter of law and policy within the province
judgments fall within the board’s often statutorily mandated concern about public welfare. Thus, the former chairman of the United States Board of Parole has provided an example of board maintenance of general deterrence aims:

You take a bank president who embezzles half a million dollars and he gets a substantial sentence—the judgment of the court is (A) he is going to observe the rulings of the institution, no question about that—he is not going to be a problem in the institution—and (B) probably if released he would not be the president of the bank, he would not have the opportunity to embezzle money. But there is a matter of the public interest and public welfare that there be some deterrent from people taking half a million dollars out of your bank or mine.109

In making decisions premised on this approach, the board is really considering “the weightiness of considerations of retribution, moral reprobation, community reassurance or deterrence.”110 Here, the claimed expertise of boards is at sea in waters unsailed by experts.

Legislative judgment may be made that this is a proper role for parole boards; if that is done knowingly, so be it. However, if that be the case, then we are further disarming the courts of traditional functions with which they have generally been associated.111

The second component of the board’s looking to the past is that some

of judges, best known to the participants in the trial, and properly to be estimated for purposes of voicing the community’s condemnation at the time of the pronouncement of a sentence. It is, more importantly, not a subject on which there is need to “wait and see” whether the defendant is ready for release. On the contrary, the inclusion of such a criterion in the parole board’s domain is, though all inadvertently, an invitation to the illicit, “political” judgments of public opinion of which parole boards are often suspected.

Frankel, supra note 16, at 37.

109. Hearings, supra note 1, at 409 (testimony of George Reed).


111. This is not to say that judicial sentencing is a satisfactory process. As WORKING PAPERS, supra note 31, observe:

In the vast majority of jurisdictions, most formal sentencing decisions are made by the trial judge. It is unlikely that this tradition will be abandoned, but it is not without its difficulties. Judges are appointed or elected on considerations generally unrelated to their abilities to sentence criminal offenders. Most are lawyers with little training in the behavioral sciences. Few have had much experience with the administration of criminal justice.

Id. at C-100. See also Frankel, supra note 16. Although a judge may be swayed by his own prejudice or the glare of public attention, so too may the parole board be so affected. See Gaylin, supra note 1.
hints for the future are thereby obtained. We do not gainsay the relevance of some, or all, of these factors of past history as suitable items for consideration in assessing the likelihood of future criminal conduct. There are indeed correlations between some of these, at least, and the likelihood of such activity.112 But given the cost113 and the negative, or at best, neutral impact of imprisonment,114 one is hard pressed to see why one should nevertheless adopt a "wait and see" attitude, as Judge Frankel puts it,115 opting for incarceration and only at some point in the course of that experience bringing into active consideration these factors as relevant to the issue of confinement.116 Not only the offender, but society as a whole, pays the price:

We may . . . persist in incarceration of persons who do not need institutional control. We can take a minor property offender and help him to develop into a more serious offender by unnecessary and long incarceration as surely as if we conducted vocational training in hate, violence, selfishness, abnormal sex relations, and criminal techniques.117

If, indeed, there are factors which sustain some verifiable predictions about the offender, there seems little reason why the judge cannot employ these at the time of initial sentencing, rather than postponing their

113. See Richmond, Measuring the Cost of Correction Services, 18 Crime & Delinquency 243 (1972).
114. There is some evidence that the practice of keeping men incarcerated longer in itself increases the probability of recidivism. See, e.g., Robson & Smith, supra note 11, at 71-72; Rubin, Long Prison Terms and the Form of Sentence, 2 Nat'l Probation & Parole Ass'n J. 337, 337-38 (1956). Moreover, the mere fact of incarceration has negative impact on the offender in terms of his being able to function in the community. Challenge of Crime, supra note 30, at 165.
115. See note 108 supra.
116. Working Papers, supra note 31, at C-102 to -03, support a presumption against imprisonment. Cf. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968), which states the view:

[T]hat approximately ninety per cent of those now committed to state institutions fall within the class where long sentences are not justified, is supported by the views of most penologists, and indeed by the conduct of most parole boards as well.

Id. at 59.
117. Deterrent Effects of Criminal Sanctions, supra note 73, at 35.
utilization until a later point in time. Of course, should imprisonment ensue, then these predictive devices again come to the fore. Our point here is that their use should not be deferred on the assumption that only parole boards can deal with them.

Assessment of another commonly voiced concern of parole boards, community readiness, raises like problems. If community readiness is code language for moral judgments about the seriousness of the crime, then we fall back to our earlier questioning of the proper allocation of decision-making roles. If the concern centers around the availability of community and family resources to assist the offender upon release, the function here seems to be a traditional one performed by social agencies, certainly requiring no special unchecked discretionary powers granted in the name of expertise, and again seriously raising issue with the notion of adopting a wait and see attitude before beginning to develop the resources in the community which the offender needs.

Were expertise without more a sufficient rallying cry for professional immunity from procedural protections within a given system, due process would be a stranger to much of that in which government engages. Obviously, it is not. In the case of parole boards, expertise becomes particularly suspect, and thus particularly susceptible to due process elements, when the main substance of that expertise—rehabilitation—is reduced to largely rhetoric; when that expertise has little data to verify its accuracy; and when there is serious issue as to its delayed exercise in some instances, and even as to its very relevance in others.

III. OTHER ELEMENTS OF PAROLE DECISION-MAKING

The claim of parole boards for immunity from the imposition of procedural safeguards on the basis of the rehabilitative role they perform is largely belied by the virtually unanimous evidence that incarceration is in fact not a rehabilitative device. With the premise of rehabilitation absent, parole board expertise subsides to the level of informed knowledge and judgment no more special than that exhibited by other administrative agencies.

A. Articulated Concerns

Another aspect of parole decision-making which refutes the argument for immunity stems from an examination of the substance with which board expertise is in fact dealing. Notwithstanding their preeminent reliance upon the position that they bear the mantle of diagnostic expertise to assess whether the cure of rehabilitation has taken hold, few parole agencies would claim they serve no other functions. Such a claim would hardly be tenable since statutory mandates generally direct them
to consider the welfare of society\textsuperscript{118} and conformance to prison conduct rules in considering whether to grant an inmate parole.\textsuperscript{119} These criteria, combined with the usually mandated concern about the offender living at liberty without committing future criminal acts,\textsuperscript{120} join together in board concern about recidivism. But here, too, there is little sustenance for the contention that procedural safeguards are alien to board operations.

Perhaps because parole decision-making, even when it involves considerations far more mundane than the bracing doctrine of improvement through imprisonment, is "one of the most difficult, sensitive, and complicated actions in the entire criminal justice system,"\textsuperscript{121} most discussion is descriptive, rather than analytical.\textsuperscript{122} Thus, one commentator has stated that the two basic and inclusive criteria for parole selection are "the community's readiness to receive back the offender and the offender's readiness and willingness to return to a law-abiding life."\textsuperscript{123} And another student of parole reasons:

This decision-making process must involve more than sentimentality, sympathy, charity, or a count of prior violations. Rather it demands a meaningful diagnosis and a prognosis that the individual does have sufficient internal strength to return to the community where essentially the same physical, social, and psychological forces are present as were at the time of commission of his criminal act, and to make an adequate adjustment in spite of these factors.\textsuperscript{124}

While laundry lists of considerations sometimes appear,\textsuperscript{125} these ex-

\begin{itemize}
  \item \textsuperscript{118} See, e.g., 18 U.S.C. § 4203 (1970).
  \item \textsuperscript{119} See, e.g., 18 U.S.C. § 4202 (1970). For a compilation of parole eligibility criteria, see Parker, supra note 18.
  \item \textsuperscript{120} See, e.g., 18 U.S.C. § 4203 (1970).
  \item \textsuperscript{121} Fields, Illinois Parole and Pardon Board Adult Parole Decisions, The Decalogue J., Summer, 1972, at 9.
  \item \textsuperscript{122} In fact, one of the most comprehensive studies of parole in America, IV U.S. Att'y Gen. Survey On Release Procedures—Parole [hereinafter cited as Att'y Gen. Survey], is virtually barren of any examination of the actual dynamics of the decision-making process. The Task Force Report, supra note 1, offers little more. But see Analysis of Parole Selection, infra note 133.
  \item \textsuperscript{123} Parole Process, supra note 105.
  \item \textsuperscript{124} C. Newman, Sourcebook on Probation, Parole and Pardons 210 (3d ed. 1968).
  \item \textsuperscript{125} See, e.g., Richardson, Policies and Procedures of the United States Board of Parole, 19 Fed. Probation, Dec., 1955, at 14; Chappel, Federal Parole, 37 F.R.D. 207, 210 (1965); W. LaRoe, Parole With Honor 122-143 (1939); L. Ohlin, Selection for Parole (1951). See generally United States Bd. of Parole, Dep't of Justice,
RULES OF THE UNITED STATES BOARD OF PAROLE 14, 14-16 (1971) [hereinafter cited as PAROLE BOARD RULES], which contains a listing of factors.

The following chart, reprinted in W. PARKER, supra note 18, at 192-93, compares parole board members' views of various prisoner characteristics as predictors of parolee success with the actual success rate of parolees with these characteristics:

Prisoner Characteristics As Predictors of Parole Success

A. Opinions of Parole Board Members as to "the general worth" of various prisoner characteristics in "predicting the success of a man on parole"; B. Predominant statistical findings on success rates of parolees with these characteristics (compared with average rates for all parolees)

<table>
<thead>
<tr>
<th>Prisoner Characteristics</th>
<th>A. Percent of Board members considering this item:</th>
<th>B. Actual success rates (or range, if findings are inconsistent in different states)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Unfavorable Neutral or Indefinite Favorable</td>
<td></td>
</tr>
<tr>
<td>1. History of frequent intoxication</td>
<td>88.6 11.4 ----</td>
<td>Low</td>
</tr>
<tr>
<td>2. Age 20 or less when up for parole</td>
<td>35.4 35.5 29.1</td>
<td>Low</td>
</tr>
<tr>
<td>3. Age 25 or more when up for parole</td>
<td>6.3 31.7 62.0</td>
<td>Average to High</td>
</tr>
<tr>
<td>4. Long delinquency record as a juvenile</td>
<td>81.0 17.7 1.3</td>
<td>Low</td>
</tr>
<tr>
<td>5. Parents divorced</td>
<td>41.8 56.9 1.3</td>
<td>Slightly Low</td>
</tr>
<tr>
<td>6. Divorced from spouse</td>
<td>41.8 49.5 8.7</td>
<td>Slightly Low</td>
</tr>
<tr>
<td>7. Left parental home at an early age</td>
<td>58.2 36.7 5.1</td>
<td>Low</td>
</tr>
<tr>
<td>8. Active interest by family during imprisonment</td>
<td>1.3 6.3 92.4</td>
<td>High</td>
</tr>
<tr>
<td>9. Narcotic addiction</td>
<td>81.0 17.7 1.3</td>
<td>Average to Low</td>
</tr>
<tr>
<td>10. Good work record prior to imprisonment</td>
<td>--- 2.5 97.5</td>
<td>High</td>
</tr>
<tr>
<td>11. Constructive use of prison time (e.g., active participation in treatment or training program)</td>
<td>--- 6.3 93.7</td>
<td>Slightly low to Slightly high</td>
</tr>
<tr>
<td>12. Inadequate prospective parole job</td>
<td>51.9 48.1 ---</td>
<td>Low</td>
</tr>
<tr>
<td>13. Committed crime alone</td>
<td>25.3 32.9 41.8</td>
<td>Slightly low to Slightly high</td>
</tr>
<tr>
<td>14. Committed crime as leader of two or more associates</td>
<td>79.8 16.4 3.8</td>
<td>Low</td>
</tr>
<tr>
<td>15. Probation violation</td>
<td>62.0 32.9 5.1</td>
<td>Low</td>
</tr>
<tr>
<td>16. More than two years imprisonment on present term</td>
<td>12.7 39.2 48.1</td>
<td>Average to Low</td>
</tr>
<tr>
<td>17. Commitment for homicide</td>
<td>10.1 21.5 68.4</td>
<td>High</td>
</tr>
<tr>
<td>18. Commitment for forcible rape</td>
<td>55.7 29.1 15.2</td>
<td>High</td>
</tr>
<tr>
<td>19. Commitment for burglary</td>
<td>50.6 34.2 14.2</td>
<td>Low</td>
</tr>
<tr>
<td>20. Commitment for forgery</td>
<td>73.4 19.0 17.4</td>
<td>About average</td>
</tr>
<tr>
<td>21. Commitment for armed robbery</td>
<td>58.2 31.7 10.1</td>
<td>About average</td>
</tr>
</tbody>
</table>
planations, such as they are, do not move us very far in understanding
the dynamics of actual decisions. Apparently, they have not been of
particular assistance to some parole board members either, since the
United States Board of Parole—in the past, at least—has justified its
resistance to providing reasons for denial of parole with the reasoning
that it is “impossible to state precisely why a particular prisoner was
or was not granted parole.”

Nevertheless, more precise analysis is possible beyond the generalities
of the individual’s readiness and the community’s readiness. The first
category of considerations deals with the offender’s pre-incarceration
history. Here one analyst of the process includes the following factors:
“previous criminal record;” “crime for which convicted;” “age;” “race
and nationality;” and “mental status.” The United States Board of
Parole, in its listing of “pertinent factors to be considered and evalu-
ated,” includes “sentence data;” “facts and circumstances of the off-
ense;” “prior criminal record;” and “personal and social history.”

The second category of considerations focuses around the readiness
of the community to receive the offender back into the free world and
the availability of community services to assist him. One characteriza-
tion of these elements discusses “family attitude;” “family competence
in supervision;” “attitude of law enforcement officials;” “community
bias;” and the “parole plan.” The United States Board of Parole, in
its listing, includes the following:

G. Community Resources, Including Release Plans
   (1) Residence; live alone, with family, or others
   (2) Employment, training, or academic education
   (3) Special needs and resources to meet them.

126. United States Bd. of Parole, U.S. Dep’t of Justice, Functions of the
United States Board of Parole 5 (1964). See Address by M. Sigler, supra note 33:
The topic for presentation—are parole boards using the right factors for parole
selection? Calls [sic] for a straightforward answer. Unfortunately, the best answer
available at this time is an unassured possibility. The problem is that we don’t
know. Not only do we not know whether they are the right factors, most often
we do not even know what factors they are. . . .

Id. at 1 (emphasis in original). In an effort to ameliorate this situation, the Board has
recently developed guidelines for decision-making. See note 33 supra.

127. See generally Sentencing, supra note 38, at 261-298; Dawson, The Decision
to Grant Or Deny Parole: A Study Of Parole Criteria In Law And Practice, 1966
Wash. U.L.Q. 243. See also Collins, supra note 101.


130. Parole Process, supra note 105, at 147-150.

131. Parole Board Rules, supra note 125, at 15.
The third category is considerably less cohesive in interrelationship. In this grouping fall such issues as the existence of detainers, the "point of view of the parole authorities," "the hearing," and "the length of time in prison." We do not question the assertion that parole boards do indeed take into account these three categories of factors. But we see nothing in them, or in the expertise deployed to assess them, which intrinsically conflicts with the infusion of due process safeguards.

Obviously, at base we are rendering a personalized judgment here. Due process is an elusive concept, and its forced application to a given governmental action is a matter of balancing competing considerations. Moreover, specific instances of detriment can rarely be identified, and thus proponents of due process in parole decision-making are forced to make their argument on the basis of analogies to other elements of the criminal justice system. Unfortunately, this is one of the consequences of a closed system—the failings which would disclose its flaws are secreted by virtue of the very system which sustains them. Ultimately,


133. *Id.* at 157. One former parole board member has noted that the formal consideration of records, reports, parole plan, family attitude and statutory strictures are "always tied in with the board members' own values, experiences, and beliefs." Thomas, *An Analysis of Parole Selection*, 9 CRIME & DELINQUENCY 173 (1963) [hereinafter cited as *Analysis of Parole Selection*] He notes, for example, that "each member of the Indiana Parole Board . . . has revealed strong prejudice against at least one particular crime—(1) rape, (2) homicide, (3) white collar crime," and that "the significance of this personal bias must not be understated." *Id.* at 218. See also W. Gaylin, *supra* note 32, suggesting that the U.S. Board of Parole has a negative policy concerning parole of Selective Service Law violators. But see Gottfredson & Ballard, *Differences in Parole Decisions Associated with Decision-Makers*, 3 J. RESEARCH IN CRIME & DELINQUENCY 112 (1966); Foote, *supra* note 68, at 25.

Cf. Tagaki & Robison, *The Parole Violator: An Organizational Reject*, 6 J. RESEARCH IN CRIME & DELINQUENCY 78 (1969), concluding that selective enforcement of regulations by parole supervisors is a function of personal and bureaucratic perceptions of these rules.

134. *Parole Process*, supra note 105, at 156-57. "[A]t the hearing the board has the opportunity to 'size up' the applicant by direct observation rather than having to rely on the impressions or studies reported by others." *Id.* at 156.

135. *Id.* at 150-52.

136. Sometimes, specific substance for these arguments does appear, such as verification that significant mistakes were contained in parole board files. See, e.g., *Hearings*, supra note 1, at 263-276 (testimony of Raymond Harlan); *id.* at 451 (testimony of Dr. Willard Gaylin). Then, too, occasionally a board member will reveal certain biases which are particularly troublesome in a system where wide discretion is the rule. See, e.g., *Analysis of Parole Selection*, supra note 133. One board member has acknowledged
we have no special truths to uncover which will compel the balance to firmly lodge on the side of due process, save the perceptions of adverse parole decisions as involving very serious results for all involved, and of lack of procedural fairness—or at least the appearance of fairness—as having significant detrimental consequences.

We have deferred comment on the fourth category of considerations which the board reviews because these have a familiar ring. They all turn on what happens to the man while in prison. The United States Board of Parole speaks of "changes in motivation and behavior" and "institutional experience."137 Giardini discusses "conduct in prison," "progress in prison," "prison work record," "educational achievement in prison," "personality changes and development," and "lack of interest in parole."138

Once again, we see the notion of prison as a beneficial experience for the inmate—either beneficial in terms personally perceived by the inmate, or in terms of the development of behavior patterns which society wants to see adopted by him. And once again, the bleak record of rehabilitation endeavors leads to the conclusion that parole boards are searching for a non-existent cure. What is more, they are indulging in this search to the considerable detriment of those maintained in custody for lack of having been cured, and at considerable expense to the public, which pays more than one billion dollars annually to support prisons.

B. Less Articulated Concerns

In addition to the more generally articulated elements identified as playing a part in the parole release decision, there are more or less subterranean influences at work which, if they do not diminish the argument borne of claimed expertise, at the least bring that expertise down to a far more mundane level than that associated with the rhetoric of rehabilitation.139

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137. PAROLE BOARD RULES, supra note 125, at 15.
138. PAROLE PROCESS, supra note 105, at 139-140.
For example, parole boards are very much aware of public clamor, or the potential for it, when a parolee is arrested or convicted for an offense committed while on parole.\textsuperscript{140} Concern regarding public opinion is thus a necessary ingredient in the decision-making mix. Of course, in many instances statutory direction generates such concern: the federal statute setting out the criteria to guide the United States Board of Parole—fairly typical criteria—includes the mandate that the Board consider the "welfare of society."\textsuperscript{141} "Welfare," obviously a vague term, lends itself to definitions ranging from public safety to public adverse reaction. Consequently, notwithstanding the possibility of a man's readiness for release in terms of his own personal make-up and even gauged by the measure of public safety, concern about public opinion may deter an affirmative decision to release.\textsuperscript{142}

Another consideration which intrudes into the parole board's decision-making process which again has little or nothing to do with the individual's readiness for release, or the community's for that matter, is the statistics of prison populations. Prisons are expensive—much more expensive than probation or other noninstitutional programs. Notwithstanding the rhetoric of law and order, at some point public demands for economy do become dispositive.\textsuperscript{143} Consequently, corrections officials must be concerned about population size, since they only have limited resources to house and sustain their clientele. One function of parole boards, then, is to assure that prison populations do not exceed manageable maxima.\textsuperscript{144} Pressure from the bottom—incoming inmates—compels relief at the top, \textit{i.e.}, removal of inmates from the population through parole.\textsuperscript{145} Here, expertise, if such is needed, turns on ledger sheets, not psychological insights.

\textsuperscript{140} Parole Process, \textit{supra} note 105, at 148.
\textsuperscript{143} See, \textit{e.g.}, Comment, \textit{Due Process and Revocation of Conditional Liberty}, 12 Wayne L. Rev. 638, 640 (1966). Task Force Report, \textit{supra} note 1, at 194, reported that the average yearly cost for a parolee is $231.20, as compared with $1,912.60 for maintaining a person in prison.
\textsuperscript{145} For a description of this phenomenon, see M. Braley, \textit{On the Yard} 37 (1967);
Another factor which enters into parole decision-making is the concern about the adverse effects of imprisonment. Paradoxically, parole authorities, which depend upon the institution of imprisonment for their existence, must also recognize the deleterious consequences which are generally acknowledged to flow from that experience. At some point, these consequences may supersede the issue of whether the individual has progressed to the stage of parole readiness in terms of the rhetoric of rehabilitation. Thus, "often, inmates are paroled despite the board's judgment that they are likely to commit new criminal offenses." Moreover, release may occur despite the likelihood of recidivism for reasons other than the length of time already served. Dawson notes, for example, that the minimal seriousness of the anticipated future offense may justify discounting the likelihood of its occurrence as being a negative factor militating against release.

Still another element which is involved in the parole decision-making equation concerns the matter of maintaining control over inmates. Whether or not prisoner conduct is made an explicit statutory precedent to parole release, it clearly is a significant factor in the release decision, making parole, in the words of one witness before Subcommittee No. 3, "the single most important source of coercive power within the correctional system." Foote offers the view that:

Cf. N.Y. Times, Nov. 19, 1972, at 41, col. 1, reporting the early release of Florida prison inmates because of overcrowded state prisons.

146. According to one state parole board member, some of the negative aspects that accrue with increased periods of incarceration include:

(1) Loss of progress made in institutional training and treatment programs through the discouragement which goes with a long period of treatment.
(2) Acclimation to highly regimented living and the accompanying loss of capacity for self-direction and decision making.
(3) Breakdown during long confinement of contacts with socially healthy people on the outside and an increasing dependency on inmates for companionship and acceptance.
(4) Assimilation of distorted social values and general embitterment.
(5) Financial loss to the taxpayer who has supported the offender in confinement and frequently his family on the outside.
(6) The emotional damage and physical hardship caused spouses, children and other relatives.


147. SENTENCING, supra note 38, at 278.

148. Id. at 278-280.


150. Hearings, supra note 1, at 650 (testimony of Robert Brooks); id. at 88 (testimony of Prof. Leonard Orland).
Despite all the rhetoric about individualization and treatment, I am convinced that the major impetus behind the development of parole and other measures of indefinite sentence length ... has been the effort of correctional bureaucracy to achieve better control over their population and management problems.\textsuperscript{151}

The intimate alliance of parole and control means that a prisoner's conduct is geared to the degree of effect it will have on his chances for release. The file, or 'jacket,' filled with write-ups of misconduct is a threat to favorable consideration. More pernicious is the extension of control beyond the sustaining of conduct to coercion aimed at behavioral modification. One author, in discussing the utility of the indeterminate sentence—which of course is intertwined with parole—has described it as "a wedge or outside motivating force which will stimulate the patient to change."\textsuperscript{152} Thus, mere absence of adverse write-ups is not enough; the jacket must also show participation in Alcoholics Anonymous, group therapy, or other 'rehabilitative' enterprises.

The results of parole's service as a control device are enormous—the most invidious consequences of parole, in fact. Since the rhetoric of rehabilitation places a premium on participation in 'rehabilitative' programs, inmates find it necessary to seek out such endeavors. Unfortunately, there is virtually no evidence or data to support the utility of such programs. Obviously many, if not all, inmates are astute enough to realize the substantive irrelevance of these programs, and thus imprisonment becomes a matter of role-playing.\textsuperscript{153} Such a circumstance must necessarily diminish the utility of endeavors which do possibly have

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\textsuperscript{151} A particularly blunt expression of the coercive potential of the parole-indeterminate sentence combination, is articulated in Boslow & Manne, \textit{Mental Health in Action}, 12 Crime & Delinquency 22 (1966), detailing treatment of adult offenders at Patuxent Institution, Maryland, and describing the indeterminate sentence as reinforcement used to promote pressure upon the inmate to rehabilitate rather than casually "do time." \textit{Id.} at 26. For a critical assessment of Patuxent Institution, see Stanford, \textit{A Model Clockwork Orange Prison}, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 9. \textit{See also} Prettyman, \textit{supra} note 67, at 21-34.

\textsuperscript{152} Boslow & Manne, \textit{supra} note 150, at 26.

\textsuperscript{153} \textit{See} notes 38-39, \textit{supra} and accompanying text. \textit{See also} Prettyman, \textit{supra} note 67, at 25-29. \textit{Cf.} Working Papers, \textit{supra} note 31, contending that:

No offender should be required or coerced to participate in programs of rehabilitation or treatment nor should the failure or refusal to participate be used to penalize an inmate in any way in the institution.

\textit{Id.} at C-41.
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some value, to say nothing of further confirming the conviction of inmates that they are caught up in a system of non-reason and caprice.\textsuperscript{154}

In addition, utilization of parole for control purposes means that prisoner conduct must be an element in the decision-making process, even though misconduct may have no relevance to performance in the free world, and in fact may even at times have an inverse relationship to success on the street.\textsuperscript{155}

Finally, the intimate relationship of concerns about control and parole has had the result of vesting prison guards with enormous power.\textsuperscript{156} The ‘power of the pen’ becomes enormous, with every notation in the prisoner’s jacket a potential bar to favorable board consideration. This follows almost as a necessary consequence of rehabilitation rhetoric, because if personality change is set up as the lynchpin of favorable board consideration, obviously those who are in closest contact with the inmate become necessary information sources in verifying that change, or the lack thereof. Unfortunately, there seems to be fairly uniform accord that prison guards are ill-suited to have such power, being ill-trained and ill-equipped to deal with inmates on anything more than a custodial basis.\textsuperscript{157}

A final element of decision-making turns on the issue of sentence disparity, which is a prime cause of inmate grievances.\textsuperscript{158} Thus, the United States Board of Parole states in its most recent Biennial Report:

\textsuperscript{154} Cf. \textit{Struggle For Justice}, supra note 72, at 94.

\textsuperscript{155} A current parole board member notes:

\ldots some of the greatest parole risks are the best behaved inmates in the institution. And some of those persons who aggressively reject the artificial life of the institution and others who amass misbehavior records do the best on parole. Collins, \textit{supra} note 101, at 1360. Collins additionally notes that prison management is a necessary concern for parole boards, and that release of an inmate with a bad conduct record may adversely affect prison discipline by “diluting the general motivation of the inmate body toward maintaining an orderly and safe institution.” \textit{Id.} at 1361. \textit{See also} \textit{Sentencing}, \textit{supra} note 38, at 270.

\textsuperscript{156} Giardini theorizes that the best determination of parole can be made when it is supplemented by information obtained on the basis of guards’ observations, which often can be made when the inmate is unaware of being observed. Although there is often friction between guard and inmate, if the former can be trained to observe and relate in an unprejudiced manner, his experience may be harnessed to aid the parole board in the determination of readiness for parole. \textit{See Parole Process}, \textit{supra} note 105, at 44-45. \textit{See also} \textit{Treatment & Survival}, \textit{supra} note 54, at 9.

\textsuperscript{157} \textit{Task Force Report}, \textit{supra} note 1, at 93. \textit{See also} \textit{Joint Comm’n on Correctional Manpower & Training, A Time to Act} 9 (1969).

\textsuperscript{158} \textit{See} Hart Jr., \textit{The Aims of the Criminal Law}, 23 \textit{Law & Contemp. Probs.} 401, 439-440 (1958); \textit{Sentencing}, \textit{supra} note 38, at 215-221; \textit{Adult Control}, \textit{supra} note 144, at 106.
It is clear that the multiplicity of sentencing choices available to the courts, and the varying attitudes between sentencing judges results in a wide disparity in the lengths of sentence imposed for persons convicted of similar offenses, and often who possess similar backgrounds. To a very real degree, the Board of Parole tends, in practice, to equalize this disparity whenever it is not bound to the one-third maximum time required in "regular sentences." ¹⁵⁹

But even in serving its function as a leavener of disparate sentences, the board is passing beyond the issues of rehabilitation and diagnostic expertise to concern about administrative correction of a systemic problem.

Moreover, in the course of meeting this need, the board aims at releasing the long-termer earlier in his sentence, and delaying the release of the short-termer. While this is beneficial to the former, particularly in light of the disutility of imprisonment as a rehabilitative vehicle, it not only does not help the short-termer—it may even penalize him by denying him parole in the name of sentence equalization.¹⁶⁰ Then too, even this case aside, the inequity of disparity is not really resolved. It is somewhat alleviated, but it still remains in good measure, merely displaced to a later stage in the process, with the consequence being parole release disparity.

In closing this assessment of parole board dynamics, we make no claim to analyzing each element which is involved in parole release decision-making in order to test its particular amenability to due process protections. Such an effort would be intellectual, but hardly pragmatic. As one former board member has written, "parole selection is not a neat, precise, black-or-white process, but a very gray process indeed."¹⁶¹ Any given decision may be the result of a different mix of variables than its predecessor and its successor, and an explicit assessment of procedural safeguards may register positive for one mix of variables, while tend negative for another.

We do find, however, little compelling argument against the infusion of due process inherent in the factors the board claims for its own. We

¹⁶⁰. The United States Board of Parole, for example, reports:

Selective Service law violators who receive long sentences generally often receive parole, while those who are given short sentences are not paroled. Thus, for this type of offender, a relative balance between individuals and time served is thus achieved by the Board despite the wide disparity in sentencing practices by the courts.

Id. at 22.

¹⁶¹. Analysis of Parole Selection, supra note 133, at 220.
maintain this view not because due process is somehow a legal *deus ex machina* to resolve all perceived ills, but because it at least injects some fairness into a decision-making process the conclusions of which carry such heavy import.\(^{162}\) Liberty is the commodity for exchange, and some very potent guns are going to have to be brought to bear to debase the value of fairness in handling that commodity. Rehabilitation and expertise fail, and we perceive nothing else which succeeds.

**IV. Conclusion**

As the myth of rehabilitation dissipates, so must critical scrutiny of parole and parole boards increase. At present, the trends are mixed; in California, the emphasis is on restricting parole board authority,\(^{163}\) and in Minnesota and Wisconsin the present experimentation with contract parole involves reduced discretion.\(^{164}\) But in Virginia, the direction is toward enhanced empowerment,\(^{165}\) and the Model Penal Code\(^{166}\) and the revision of the federal criminal laws proposed by the National Commission on Reform of Federal Criminal Laws sustain the viability and power of parole boards.\(^{167}\) And parole boards of course subscribe to

\(^{162}\) Of course, infusion of due process procedures at the parole hearing stage has significant implications as to due process considerations at the prison hearing stage, since a significant factor in the parole decision-making process is the matter of prison conduct. Obviously, the benefits of due process at the parole hearing will be mitigated to some extent if lack of fairness at a preceding stage results in determinations which will subsequently have an adverse impact on the release decision. See, e.g., Myers v. Aldredge, 348 F.Supp. 807, 824 (M.D. Pa. 1972).

\(^{163}\) See, e.g., ORDER OUT OF CHAOS, supra note 16. In January, 1972, the California Adult Authority decided to give every California convict a tentative release date, creating what it described as a “learn and earn” system. This no doubt was in response to the volume of criticism leveled at the Adult Authority’s practices. See, e.g., Mitford, supra note 1.

\(^{164}\) See generally note 55 supra for a discussion of contract parole. For a discussion of its employment in Minnesota, see Hearings, supra note 1, at 534 (testimony of Llewellyn Linde).

\(^{165}\) The Washington Post reported that the Virginia Bar Association had endorsed a system of indeterminate sentencing, with the state parole board having “wide latitude in determining how long convicts remain in prison.” Boldt, Flexible Sentencing Urged in Virginia, Washington Post, Dec. 21, 1972, § E, at 4, col. 2.


\(^{167}\) The proposed code is silent as to parole release hearing procedures. NAT’L COMM’N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT § 3402 (1971), creates a presumption of parolability, placing upon the Board the burden of denying parole rather than leaving the burden of justifying why he should be released with the prisoner.
enhanced empowerment, which they generally couch in terms of increased flexibility.\textsuperscript{168}

We think that the trend toward restriction is most in keeping with the reality of parole decision-making.

At the outset we stressed that infusion of due process is not the end-all of analysis of parole release decision-making. We do think this infusion is clearly a necessary step forward, and we subscribe to the arguments for due process which have been made elsewhere so compellingly.\textsuperscript{169} But we would caution that there is a troubling question which remains—due process to what end? If the premises of decision-making—rehabilitation linked with expertise—are flawed, procedural protections injected into the system can hardly resurrect them. And on balance, we do find the flaws more apparent than the strengths.

Nonetheless, we think a pragmatic recognition of things as they are is required. Parole does exist; it is the primary mechanism for release from incarceration. Parole decisions are being made, even if the currency they are dealing in is somewhat more base than meaningful diagnosis of personality change. First, we would opt for safeguards which will introduce some fairness and some openness into the dynamics of the process.

Second, we would suggest that parole's role as a moral arbiter be removed—at least when that role is utilized to lengthen incarceration, notwithstanding a prior display of mercy at the judicial sentencing stage. Let community disapprobation express itself in the courtroom, not behind the closed doors of parole hearing rooms, enclosed within the walls of remote prisons.

Third, we think that many of the elements which go into parole

\textsuperscript{168} National Parole Conference, Declaration of Principles of Parole (1939), states that for parole fully to achieve its purposes, "the sentencing and parole laws should endow the paroling authority with broad discretion in determining the time and conditions of release." National Probation and Parole Ass'n, supra note 71, at 182. In Federal Parole and the Indeterminate Sentence, 23 Fed. Probation, Dec., 1959, at 12, 14, George Reed, then the Chairman of the United States Board of Parole, wrote of the enhanced flexibility that a recently enacted semi-indeterminate sentencing provision gave the Board. Fourteen years later, an assessment of this provision's implementation by the Board was made by a federal district judge, who concluded there was good reason to believe that the implementation of this provision was in fact a "farce." Frankel, supra note 16, at 12-13. See also Hearings, supra note 1, at 299 (testimony of Prof. Herman Schwartz).

decision-making should, if they do evidence merit, be moved forward in the process. Imprisonment generally is detrimental to the offender, and affords little benefit to the public. Where that detriment can be avoided and that benefit enhanced, they should be. Reliance should not be placed by sentencing judges upon the notions that beneficial change is going to occur in prison, or that lengthy sentences serve rehabilitative ends.

This is not to say that we discount those purposes of incarceration other than rehabilitation: incapacitation, retribution, deterrence—both general and special, and denunciation. At least some of these, and perhaps all, are relevant justifications for penal confinement. But we simply must refrain from hiding our real aims by using the pacifying language of treatment and rehabilitation. The dangers of this deception—whether intentional or not—have been incisively identified, and the consequences are too severe.\footnote{170}

Fourth, as parole now exists, it contains a considerable quantum of counter-productiveness. A major focus—or consequence—of its operation is coercion. We subscribe to the recommendation of the National Advisory Commission on Criminal Justice Standards and Goals that the offender should not be penalized for failure to participate in so-called rehabilitation programs.\footnote{171} This means that parole severs its intimacy with the rehabilitation myth. At the least, this will result in a closer approximation to reality. Optimally, it may even inject some viability into prison programs now perverted by their coercive aspects.

Finally, we would suggest that for a long time we have demanded more of corrections than it can provide. The causes of criminality are, at least with our present state of knowledge, beyond the ability of corrections to resolve. We think that in good measure this dawning awareness accounts for the plethora of criticism of prisons, and the excess of verbiage about "prison reform." While it is tempting to propose the abolition of parole, in light of its problems and its negative impact on prison life, we think some temperance is in order because so long as sentences in this country remain disparate and unproductively long,\footnote{172} we simply must have some corrective device. We do not think that inadequate solutions to deep problems are happy ones, but they are necessary pending other alternatives.

\footnote{170. See note 94 supra.}

\footnote{171. See note 153 supra. See also STRUGGLE FOR JUSTICE, supra note 72, at 97-99.}

\footnote{172. WORKING PAPERS, supra note 31, at C-103: "It is well-documented and almost universally recognized that the sentences imposed in the United States are the highest in the Western World."}
We would venture to predict, however, that the future for parole is not an optimistic one. Reduction in prison populations following from the new emphasis on community-based corrections and on decriminalization of victimless crimes, and the growth of graduated release programs administered by prison officials,\footnote{173} suggest a diminishing population for parole boards to deal with. Appellate review of sentences,\footnote{174} sentencing councils, and the like, intimate the subsidence of sentence disparity as a prime justification of board operations. A renewed effort to reduce sentences may result in dispelling the urgent need for the element of leniency which boards promise.\footnote{175}

Whether or not our predictions for the future of parole in fact are realized, it is clear that the palmy days of obscurity are over for parole. It is being cast into the forefront of critical scrutiny—a position it well deserves. Parole, after all the rhetoric is put aside—much of it well-intentioned, but nonetheless obfuscatory—is a governmental process, much like any other such process. It is necessarily responsive to needs which diminish its goals, and unresponsive to other needs which may, as the case may be, either diminish or enhance them.

Present necessity compels parole's survival, but the traditional procedures and protections which gird virtually all other formal governmental

\footnotetext{173}{See note 92 supra.}

\footnotetext{174}{NATIONAL COMM'N ON REFORM ON FED. CRIM. LAWS, FINAL REPORT § 1291 (1971), recommends appellate review for all sentences, such review allowing for possible modified sentences or cases being set aside for further proceedings. See also CHALLENGE OF CRIME, supra note 30, at 145-46; WORKING PAPERS, supra note 31, at Standard 5.11; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES (Approved Draft, 1968).}

\footnotetext{175}{WORKING PAPERS, supra note 31, recommend that "state penal code revisions should include a provision that the maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed 5 years for felonies other than murder." Id. at C-102. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES standard 2.1(d) (Approved Draft 1968), provides that "except for a very few particularly serious offenses, and except under the circumstances set forth in section 2.5(b) (special term for certain types of offenders), the maximum authorized prison term ought to be five years and only rarely ten." NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 9 (1972 Revision) also proposes a five year maximum, except for dangerous offenders, murderers and perpetrators of "atrocious crimes."}
activity compel its reform. Due process holds no magic answers for producing a system which can dispositively cope with the problems of crime and the criminal offender; but it does at least promise fairness and justice.